IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 407 of 1987

with

CRIMINAL APPEAL No 495 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

NATVERSINH MADARSINH JHALA AND OTHERS

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 407 of 1987
MR YU MALIK for Appellants
MR ST MEHTA for Respondent.

2. Criminal AppealNo 495 of 1987
MR ST MEHTA for the appellant.
MR YU MALIK for Respondents.

CORAM : MR.JUSTICE J.M.PANCHAL

and

MR.JUSTICE M.H.KADRI

Date of decision: 18/12/96

ORAL JUDGEMENT: (Panchal,J.):-

As both these appeals are directed against common judgment and order dated April 20,1987, rendered by the learned Additional Sessions Judge, Ahmedabad, in Sessions Case no.285/86, we propose to dispose them of by this common judgment.

2. In Sessions Case no.285/86 the appellants were charged under sections 302, 307, 324 read with section 34 of the Indian Penal Code for homicidal death of Kapurji Prabhatsinh. In the alternative, they were also charged under sections 302, 307, 324,109 of the Indian Penal Code as well as section 135 of the Bombay Police Act. The learned Additional Sessions Judge, Ahmedabad convicted appellant no.1 under sections 304 Part-II, 324 read with section 34 and/or 109 of the Indian Penal Code as well as section 135 of the Bombay Police Act. For the offence punishable under section 304 Part-II I.P.C. appellantno.1 was punished to R.I. for five years with fine of Rs.200/- i/d. R.I. for three months; whereas for the offence punishable under sections 324 read with section 34 and/or 109 of I.P.C. he was sentenced to R.I.for 2 years with fine of Rs.100/- i/d. R.I. for one month. So far as conviction of appellant no.1 under section 135(1) of the Bombay Police Act is concerned, he was sentenced to undergo R.I. for four months and pay a fine of Rs.50/- i/d. to undergo S.I. for 15 dys. The learned Judge convicted appellant no.2 under section 304 Part-II read with section 34 and/or 109 I.P.C. as well as 324 I.P.C. and also under section 135 of the Bombay Police Act. For the offence punishable under section 304 Part-II read with section 34 and/or section 109, appellant no.2 was sentenced to R.I. for 4 years with fine of Rs.200/- i/d. R.I. for two months; whereas for the offence punishable under section 324 I.P.C., appellant no.2 was sentenced to R.I. for two years and fined Rs.100/- i/d. he was directed to undergo R.I. for one month. For the offence punishable under section 135 of the Bombay Police Act, appellant no.2 was sentenced to undergo R.I. for four months and pay fine ofRs.50/- i/d. to undergo S.I. for 15 days. Appellants no.3 & 4 came to be convicted under section 304 Part-II read with section 34 and/or 109 I.P.C. as well as section 324 I.P.C. and also under section 135 of the Bombay Police Act. For the offence punishable under section 304

Part-II read with section 34 and/or 109 I.P.C., appellants no.3 & 4 were sentenced to R.I.for four years with fine of Rs.200/i/d. R.I. for 2 months; whereas for the offence punishable under section 324 I.P.C.,learned Judge sentenced each of them to R.I. for one year with fine of Rs.100/- i/d. R.I.for one month. The learned Judge further directed that appellants nos.3 & 4 should undergo R.I. for four months and pay fine of Rs,50/i/d. S.I. for 15 days for the offence punishable under section 135 of the Bombay Police Act. It may be mentioned that substantive sentences imposed on each of the appellants were ordered to run concurrently. The conviction of the appellants as referred to hereinabove and sentences imposed on them has given rise to Criminal Appeal no.407/87; whereas acquittal of the appellants of Criminal Appeal no.407/87 under sections 307, 302 read with section 34 and/or 109 I.P.C. has given rise to Criminal Appeal no.495/87, which is filed by the State Government.

3. Deceased Kapurji Prabhatsinh was staying at Parsi's Bhatha with his wife Madhuben and children. He was serving as watchman in a Godown. The house in which he was staying is situated in Tekarawali Chawl. On July 28,1986, the deceased had returned to his house at about 8.00 p.m. after attending duty at the Godown. A man known to the appellant no.1 had parked his cycle in the open land belonging to the deceased, as a result of which the deceased had admonished appellant no.1. Thereupon appellant no.1 got enraged and started abusing the deceased. Madhuben, wife of the deceased came out of the house and asked appellant no.1 not to abuse and also tried to persuade her husband to come in house. At that time, appellant no.2, who is neighbour of appellant no.1,came abusing on the place of occurrence with dharia. When he tried to assault deceased Kapurji, Madhuben wife of the deceased intervened and, therefore, dharia blow struck on her head. Madhuben sustained a bleeding injury and fell down on the spot. Meanwhile, accused no.1 also came with a dharia and gave a dharia blow on the head of the deceased, whereupon the deceased fell down on the ground. Appellants no.3 & 4 had iron roads with them and gave blows by the same tothe deceased, who had already fallen down. Because of the assault mounted on him Kapurji died on the spot. Madhuben out of fear, rushed to Kalyan Police Chowky, which was nearby. At the Police Chowky, constable Gedalbhai was on duty. It appears that at the relevant time, a bandobast was arranged due to communal riots going on in the City and as Gedalbhai was under an impression that P.S.I. incharge of Saraspur Police Chowky, was at Saraspur, he tried to contact him

on phone, but instead, he contacted P.I. Mr.Chauhan,who received telephonic message at about 9.00 p.m. P.I. Mr.Chauhan came to Kalyan Police Chowky and recorded complaint of Madhuben. The complaint thereafter was sent to Shaherkotda Police Station for registration. At Shaherkotda Police Station complaint was registered as C.R.no.367/86 under sections 302, 324,504 & 114 of the Indian Penal Code. P.I. Mr.Chauhan visited the place of offence and held inquest on the dead body. As Madhuben had sustained injury on head, she was referred to Shardaben Hospital for treatment with a Yadi. The investigating officer drew panchnama of place of occurrence and also collected and attached blood stained earth and control earth. The statements of witnesses who appeared to be conversant with the facts of the case, were also recorded. The dead body was thereafter sent to B.J.Medical College for postmortem where autopsy was performed by Dr.Nayankumar Natvarlal Parikh. During the course of investigation, it was learnt that Jamaben, wife of appellant no.1 had filed a non-cognizable complaint and one complaint bearing C.R.no.392/85 was lodged against appellant no.1 under sections 324, 504 I.P.C.All the four appellants presented themselves before police on July 30,1986 and panchnamas of their persons were prepared. It was noticed at that time that appellant no.4 had sustained injuries on his head. Appellant no.4 was, therefore, referred to Hospital for treatment with a yadi. While in custody appellant no.1 showed willingness to show the place where he had concealed weapons used in the crime. Therefore, two dharias as well as two iron bars were discovered by the investigating officer in presence of panchas. The incriminating articles were sent to Forensic Science Laboratory for the purpose of analysis. After receipt of necessary reports and on completion of investigation, the appellants were chargesheeted under sections 302, 307, 324, 34 and/or 109 of I.P.C. as well as section 135 of the Bombay Police Act in the Court of learned Metropolitan Magistrate, Ahmedabad. As the offences under sections 307 & 302 I.P.C. are exclusively triable by the Court of Sessions, the case was committed to Sessions Court for trial where it was numbered as Sessions Case no. 285/86.

4. The learned Judge framed charge against the appellants as indicated in para-2 of this judgment. The charge was read over and explained to the appellants, who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Dr. Nayan N.Parikh, PW.1, exh.11, (2) Dr.Dhirajlal Revashanker Mehta, PW.2, exh.16,(3) Dr.Nayan Kantilal Zinzuvadiya, PW.3, exh.18, (4) Madhuben, widow of deceased Kapurji,

PW.4, exh.21,(5) Sudhakar Baburav, PW.5, exh.22, (6) Pratapsinh Laxmansinh, PW.6, exh.23, (7) Chandrakesh Kanaksinh, PW.7, exh.25, (8) Sovaransinh Ranglalsinh, PW.8, Exh.27, (9) Dr.Rajesh Natvarlal, PW.9, exh.30, (10) Gendalbhai Bijalbhai, PW.10, exh.32, (11) Shivabhai Udesinh, PW.11, exh.33, (12) Bhimaji Sendhaji,PW.12, exh.34, and (13) Saytansinh Sartansinh Chauhan, PW.13, exh.35, to prove its case against the appellants.

5. The prosecution also relied on documentary evidence such as postmortem notes,exh.12, inquest panchnama exh.13, notification issued under the provisions of the Bombay Police Act, which was produced at exh.15, map of scene of offence exh.17, certificate indicating injuries sustained by Madhuben which was produced at exh.19, panchnama of place of occurrence exh.23, panchnama prepared while effecting arrest of the appellants etc. to prove its case against the appellants.

6. The learned Judge questioned the appellants generally on the case and recorded their statements under section 313 of the Indian Penal Code after examination of prosecution witnesses was over. The appellant no.1 stated that somebody had parked cycle in the house of the deceased, but the deceased had abused him. He also claimed that after quarrel with deceased, his wife had come on the spot, but she was also abused by the deceased. He asserted that cycle or cycles which were parked in the house of the deceased, did not belong to him. He also stressed that appellant no.4 had sustained injuries on his head, as blow of stick was given to him by the deceased. He also claimed that his yonger brother had intervened in quarrel and he had also sustained injuries on his head. Appellants nos.2,3 & 4 in their further statements claimed that case of prosecution against them was false. The appellants also examined (1) Jamaben Natvarsinh Madarsinh, DW.1, exh.43,(2) Kacharaji Bhikhaji, DW.2, exh.34, and (3) Jivuben Kadvaji, DW.3, exh.45 in support of their defence.

7. On appreciation of the evidence led by the parties, learned Judge held that Kapurji Prabhatsinh died an unnatural death. The learned Judge concluded that it was proved by the prosecution that appellant no.1 had given dharia blow to Kapurji and appellant no.2 had tried to give a dharia blow to Kapurji, which struck Madhuben; whereas appellants no.3 & 4 had given blows by means of iron bars to the deceased after he had fallen down. The learned Judge found that all the accused had come duly armed with deadly weapons and contravened not only the

notification issued by the Commissioner of Police, but had also shared a common intention to teach lesson to Kapurji and, therefore, the appellant no.1 was guilty under section 304 Part-II I.P.C.; whereas rest of the appellants were liable to be convicted under section 304 Part-II read with section 34 and/or 109 I.P.C. So far as injury to Madhuben was concerned, learned Judge held that all the appellants were liable to be convicted under section 324 read with section 34 and/or 109 I.P.C. In view of the above referred to conclusions, the learned Judge convicted the appellants as referred to earlier under section 304 Part-II read with section 34 and/or 109 I.P.C. as well as section 324 read with section 34 and/or 109 I.P.C. and section 135 of the Bombay Police Act, givig rise to these two appeals.

8. Mr. Y.U.Malek, learned Counsel for the appellants has taken us through the entire evidence on record. It was pleaded that evidence of injured Madhuben is full of contradictions and material improvements and, therefore, conviction of the appellants deserves to be set aside. It was argued that injury sustained by the appellant no.4 having not been explained by the prosecution witnesses, benefit of doubt should be given to the appellants, as prosecution has suppressed true version of the incident. What was emphasised was that the deceased himself was aggressor and, therefore, the appeal should be allowed.

9. Mr. S.T.Mehta, learned A.P.P. submitted that the evidence of injured Madhuben, who is widow of the deceased establishes beyond reasonable doubt that the appellants had notonly assaulted her, but had also killed her husband and, therefore, conviction being well-founded, the appeal should not be accepted. It was pleaded that the evidence of injured Madhuben is not only corroborated by her complaint, but is also corroborated by medical evidence on record and, therefore, conviction of the apepllants cannot be said to be erroneous so as to warrant interference of the court in the present appeal. While dealing with acquittal appeal filed by the State, it was stressed by the learned Counsel for the State Government that all the appellants had arrieved at the place of occurrence duly armed with deadly weapons and as their common intention was to cause death of Kapurji, State appeal deserves to be allowed; whereas Mr.Y.U.Malek,learned Counselfor the respondents in that appeal submitted that cogent and convincing reasons have been given by the learned Judge while acquitting the respondents under sections 307, 302 read with section 34 and/or 109 I.P.C.and finding of facts should not be

interfered with by the Court in absence of good grounds.

10. The fact that Kapurji died a homicidal death, is not disputed before us in the present appeal. The evidence of Madhuben PW.2, exh.21 as well as evidence of Sudhakar Baburav indicate that deceased Kapurji had sustained injuries on the head during quarrel, which had taken place between him and the appellants. Dr.N.N. Parikh who had performed autopsy on the dead body of Kapurji has also mentioned in detail the injuries which were noticed by him on the dead body. Those injuries are also mentioned in detail in the postmortem notes prepared by him and produced at exh.12. The injuries sustained by the deceased are also noted in the inquest panchnama exh.13. The cause of death as indicated in the postmortem notes was shock which resulted from head injuries. Having regard to the evidence led by the prosecution and more particularly medical evidence, we are of the opinion that finding recorded by the learned Judge that deceased Kapurji died a homicidal death is eminently just and is hereby upheld.

11. The submission that the evidence of Madhuben Kapurji is full of inconsistencies and, therefore, should not be acted upon, has no substance. Madhuben in her deposition before Court has stated that at the time when quarrel had taken place between her husband and the appellant no.1, she had come out of the house and asked the appellant no.1 not to abuse her husband and had also tried to persuade her deceased husband to come into house. She claimed in her evidence that appellant no.2, who was armed with dharia, had come on the scene and when he tried to cause injury to her husband by means of dharia, she had intervened as a result of which she had sustained injuries on her head. The witness testified that thereafter appellant no.1 had caused injuries on the head of the deceased as a result of which he had fallen down and appellants no.3 & 4 had thereafter caused injuries to the deceased by means of iron bars. Though Madhuben is searchingly cross-examined on behalf of the appellants, nothing is brought on record of the case to discredit her version as narrated by her in examination-in-chief. The fact that Madhuben was injured in the accident can hardly be disputed. Therefore, her presence at the time of incident can hardly be doubted. She being widow of the deceased would not allow the real culprits to go scot free and would not involve appellants falsely in a serious case. Regarding her injuries, she is materially corroborated by medical evidence. Though some omissions with reference to her earlier police statement are proved during her cross-examination, we are

of the opinion that those omissions are not of such a nature so as to destroy her evidence as a whole. Those omissions on examination are found to be trivial in nature. Her evidence also gets corroboration from the evidence of Sudhakar Baburav, PW.5, exh.22, who was tenant of deceased Kapurji. On overall view of the matter, we are of the opinion that the learned Judge has not committed any error in placing reliance on the sworn testimony of Madhuben.

12. Sudhakar Baburav, exh.22 was staying with his family members in the house of deceased Kapurji; whereas all the appellants were staying opposite his house. Therefore, witness Sudhakar was knowing all the four accused very well. This witness has also stated before the Court that appellant no.1 had given dharia blow on the head of the deceased, whereas Madhuben received injury on her head when she tried to save her husband from the blow aimed by appellant no.2 on his head. The submission that independent witnesses are not examined and, therefore, evidence of Madhuben as well as that of Sudhakar Baburav should be disbelieved, has no substance. It is well settled that reliable evidence of witnesses cannot be rejected on the ground that prosecution has failed to examine independent witnesses. The evidence given by Madhuben as well as Sudhakar Baburav does not suffer from embelishment or major contradictions. On the facts and in the circumstances of the case, we are of the opinion that prosecution has proved it beyond reasonable doubt that appellant no.1 had inflicted blow with dharia on the head of deceased; whereas appellant no.2 had caused injury on the head of Madhuben and appellants no.3 & 4 had caused injuries to the deceased by means of iron rods.

13. Though it is proved by the prosecution that the appellants had caused injuries to deceased Kapurji and Madhuben, it would be relevant to ascertain as to which offence is committed by the appellants. It hardly needs to be emphasised that the incident had occurred on account of trivial matter viz. parking of cycle on the land belonging to the deceased. All the four appellants had not gone together duly armed with at the initial stage. Everything happened on the spur of moment. There is no manner of doubt that exchange of words had taken place between the deceased and appellant no.1. The evidence of defence witnesses would indicate that the deceased had abused the appellant no.1. The injury sustained by Madhuben is not grievous in nature. As per the prosecution case, after quarrel between appellant no.1 and the deceased, appellant no.2 had come at the

place of occurrence first in time with dharia followed by appellant no.1; whereas appellants no.3 & 4 had come later on. It is relevant to note that though appellant no.2 was armed with dharia, he had not caused any injury to deceased Kapurji. Having regard to nature of injuries sustained by the deceased, it is difficult to come to the conclusion that appellants no.2,3 & 4 had any intention to cause murder of deceased Kapurji. On the facts and in the circumstances of the case, we are of the opinion that the appellants had knowledge that their acts were such which were likely to cause death of Kapurji. Under the circumstances, conviction of the appellants under section 304 Part-II & 324 read with section 34 and/or 109 I.P.C. cannot be said to be erroneous so as to call for interference in the present appeal. The prosecution has not established that intention of the appellants was to cause death of Kapurji. If their intention had been to cause death of the deceasd, minor bruises would not have been suffered by the deceased at the hands of appellants no.3 & 4. It is an admitted fact that the appellant no.4 had also sustained a bleeding injury on his head in the course of the occurrence. Injury sustained by the appellant no.4 is not explained by any of the prosecution witnesses which prompts the Court to hold that full truth regarding the incident is not disclosed by the prosecution. As all the appellants had not come together with the same type of weapons and as quarrel had taken place on the spur of moment over a trivial matter, we are of the opinion that appellant no.1 can be attributed knowledge that the injury caused by him was likely to cause death. The finding recorded by the learned Judge that the appellants had formed a common intention on the spur of the moment to cause injuries to the deceased and Madhuben, only with a view to teaching him a lesson and not with a view to causing his death is well-founded and is hereby upheld.In our view, no case is made out by prosecution for convicting the appellants of Criminal Appeal no.407 of 1987 under section 302 r.w.section 34 and/or section 109 of the Indian Penal Code and acquittal appeal is liable to be dismissed. On the facts and in the circumstances of the case, conviction of the appellants under section 135 of the Bombay Police Act can hardly be assailed. There is no manner of doubt that appellants no.1 & 2 were armed with dharias; whereas appellants no.3 & 4 were armed with iron bars. The notification produced by the prosecution indicates that the competent authority had prohibited carrying of weapons like dharias, knives, iron bars etc. The notification was in force from July 1,1986 to August 31,1986; whereas the incident in question took place on July 28, 1986. Under the circumstances, well-founded

conviction of the appellants under section 135(1) of the Bombay Police Act is also hereby upheld. Having regard to the facts of the case, no exception can be taken to conviction of the appellants under section 304 Part-II r.w.sec.34 and/or 109 I.P.C. or under section 324 r.w.sec.34 and/or 109 I.P.C. and, therefore, conviction appeal is also liable to be rejected.

14. In view of the above discussion, we find that there is no merits in any of the appeals and both the appeals are liable to be dismissed. However, it is brought to the notice of the Court by the learned Counsel for the appellants that appellant no.1 has already undergone sentence and is released from jail. As appellant no.1 has undergone sentences and State acquittal appeal is dismissed, no further directions are required to be issued with reference to appellant no.1. The learned Counsel for the appellants submitted that in all appellants no.2,3 & 4 were in jail for a period of about 13 months during the pendency trial and Criminal Appeal no.407/87 and, therefore, interest of justice would be served if they were sentenced to the period of imprisonment already undergone by them having regard to the circumstances of the case and the long lapse of time between the filing of the appeal and actual date of hearing of the appeal. In view of the evidence on record, there is no manner of doubt that appellants no.2,3 & 4 had not taken undue advantage during the incident. There is nothing to indicate that they had acted in a cruel manner. In fact, they had no enmity whatsoever either with Maduben or deceased Kapurji. As noted earlier, the incident took place on the spur of the moment over a trivial matter, but appellants no.2,3 & 4 had not taken any undue advantage of the situation at all. The medical evidence shows that appellants no.3 & 4 had caused only minor injuries to the deceased. The injuries sustained by Madhuben are also not serious in nature. Having regard to the age, characters, antecedents of appellants no.2,3 & 4 and the circumstances in which the offence was committed, we are of the opinion that interest of justice would be served if appellants no.2,3 & 4 are sentenced to the period of imprisonment already undergone by them and fine is enhanced by Rs.5000/- to be paid to injured Madhuben, widow of Kapurji Pratapji by way of compensation to her as contemplated by section 357 of the Code of Criminal Procedure, 1973, while confirming conviction of the appellants under sections 304 Part-II, 324 read with section 34 and/or 109 of I.P.C. and section 135 of the Bombay Police Act. Accordingly, we punish the appellants no.2,3 & 4 to imprisonment for the period already

undergone by them with additional fine of Rs.5000/- each, i/d. they are directed to undergo sentence of R.I. for two years.Appellants nos.2,3 & 4 are directed to deposit the amount of compensation in the Court where Sessions Case no.285/86 was tried on or before December 31,1996. Fine if deposited by any of the appellants nos.2,3 & 4, shall be paid to injured Madhuben by the learned Judge after due verification. It is clarified that if fine is deposited by any of the appellants nos.2,3 and 4, the concerned appellant will not be required to undergo sentence imposed in default of payment of fine. If the fine is not deposited by any of the appellants no.2,3 and 4 as directed above, the concerned appellant shall be taken into custody immediately after December 31,1996 to undergo sentence imposed in default of payment of fine. Both the appeals fail and are dismissed, but the sentence imposed on the appellants no.2,3 & 4 accordingly, stands modified. Muddamal be disposed of in terms of directions given by the learned Judge in the impugned judgment.

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